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**Citizenship and Electoral Rights in the Multi-Level 'Euro-Polity':  
The Case of the United Kingdom**  
Jo Shaw



# **CITIZENSHIP AND ELECTORAL RIGHTS IN THE MULTI-LEVEL 'EURO-POLITY': THE CASE OF THE UNITED KINGDOM**

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**Abstract:** This paper explores recent citizenship debates in the United Kingdom, in particular the proposal contained in a report prepared by Lord Peter Goldsmith at the behest of Prime Minister Gordon Brown to restrict rights to vote in UK elections to UK citizens, with the only exceptions being those laid down by EU law. The discussion is placed in the context of the evolving concept of citizenship in the European Union and its Member States, and for the purposes of the detailed analysis, deploys a composite concept of 'European citizenship', which combines both EU citizenship in the narrow sense, and national citizenship.

**Keywords:** Voting rights, immigration, citizenship, United Kingdom, European Union, Europe, law, constitutionalism, democracy



## Citizenship and Electoral Rights in the Multi-Level 'Euro-Polity': the case of the United Kingdom\*

### Introduction

Of the many languages of citizenship, perhaps the one most frequently used is that of citizenship as a democratic ideal. This relates to the perfection of the link between the people and the exercise of political power: government for the people, by the people. This formulation demands that critical attention be paid to the question: 'who are the people?'.<sup>1</sup> For in a world where nation states are challenged from above by integration and globalisation processes such as the European Union or global migration, and from below by autonomy claims from substate regions and nations, that question can rarely be answered simply by pointing to the historically hegemonic claims of the boundaries of the Westphalian 'nation state' as the sole legitimate democratic reference point. The 'national' people may be simpler to recognise than any other more cosmopolitan variant of the notion, because it offers something more certain and rooted as a baseline. It may also be a simpler concept to define than the 'people' of a subnational unit, not least because it relies upon a well established body of (international) law regulating acquisition and loss of nationality, and setting the parameters of physical frontiers across land and water. However, the claims of the national 'people' are not universally recognised as the sole legitimate carrier of democratic aspirations.<sup>2</sup>

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\* This is a lightly revised version of a paper to be published in: H. Lindahl (ed.), *A Right to Inclusion and Exclusion? Normative Fault Lines of the EU's Area of Freedom, Security and Justice*, Hart Publishing, 2009. I would like to thank Anja Lansbergen, PhD candidate at the University of Edinburgh, for provoking my interest in membership models.

<sup>1</sup> J Shaw, *The Transformation of Citizenship in the European Union* (Cambridge, Cambridge University Press, 2007) 20.

<sup>2</sup> See R Rubio-Marín, *Immigration as a Democratic Challenge* (Cambridge, Cambridge University Press, 2000); D Kostakopoulou, *The Future Governance of Citizenship* (Cambridge, Cambridge University Press, 2008).



Yet in the overwhelming majority of the world's states, the right to vote in national elections (and in 'regional' elections within federal states) is restricted to those who have acquired, whether by birth, registration, naturalisation or other legal process, the status of national citizen.<sup>3</sup> More often than not, states also allow *non-resident* national citizens to vote in national elections at least, although expatriate or external voting is not universal by any means.<sup>4</sup> Thus non-national residents are generally excluded from national elections. Moreover, despite exhortations to be found within some international legal instruments such as the Council of Europe Convention on the Participation of Foreigners in Public Life at Local Level,<sup>5</sup> which are intended to promote the integration of migrant non-nationals into the host state through political participation, most states still restrict the right to vote in local elections to national citizens only. The major exception to this is, of course, the situation of those citizens of the European Union who are resident in a Member State other than the one of which they are a national. EU citizens, defined under Article 17 EC as the nationals of the Member States, have the right to vote in local (and indeed European Parliamentary elections) in the state in which they reside, under the same conditions as nationals (that is, an equal treatment right) (Article 19 EC).<sup>6</sup> The EU is also the site of quite a number of examples of Member States acting under national law to extend the right to vote in local elections to *all resident* third country nationals.<sup>7</sup> Even so, the distribution of these rights means the majority of third country nationals resident in the EU Member States do not have the local franchise under

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<sup>3</sup> H Waldrauch, 'Electoral Rights for foreign nationals: a comparative overview', Paper prepared for the ESF/LESC-SCSS Exploratory Workshop: *Citizens, non-citizens and voting rights in Europe*, Edinburgh, 2-5 June 2005.

<sup>4</sup> *Voting from Abroad*, The International IDEA Handbook, 2007, available at [http://www.idea.int/publications/voting\\_from\\_abroad/upload/Voting\\_from\\_abroad.pdf](http://www.idea.int/publications/voting_from_abroad/upload/Voting_from_abroad.pdf); R Bauböck, 'Stakeholder Citizenship and Transnational Political Participation: A normative evaluation of external voting', (2007) 75 *Fordham Law Review* 2393-2447.

<sup>5</sup> ETS N 144; opened for signature on 5 February 1992; entered into force 1 May 1997; [www.conventions.coe.int](http://www.conventions.coe.int). This has been signed by ten Member States, but only five of those states have ratified it.

<sup>6</sup> Shaw, above n 1, especially ch 5. Implementation of Article 19 is regulated by Council Directive 93/109/EC OJ 1993 L329/34 (European Parliament elections) and Council Directive 94/80/EC, OJ 1994 L368/38 (local elections).

<sup>7</sup> Belgium, Denmark, Estonia, Finland, Hungary, Ireland, Lithuania, Luxembourg, the Netherlands, Slovenia, Slovakia. Not all give the right to stand as well as the right to vote. See Shaw, above n 1 at pp78 and 80, and *Trends in the EU-27 regarding participation of third-country nationals in the host country's political life*, Briefing Paper prepared for the European Parliament LIBE Committee by the Centre for European Policy Studies, Brussels, 2007.

national law,<sup>8</sup> not least because states with large populations of third country nationals such as France, Germany, Italy and Spain do not give voting rights to resident non-nationals other than under EU law.<sup>9</sup> The UK's voting rights for third country nationals are also patchy, being confined to Commonwealth citizens, thus excluding many recent immigrants who are not of Commonwealth origin. At present, there is nothing in EU law which requires Member States to extend the right to vote in local elections beyond EU citizens to include third country nationals as well.<sup>10</sup> Thus understanding the pattern of political participation rights in the context of the EU and its Member States (understood here as a composite 'Euro-polity' with multiple sites of constitutional authority) requires the study of both national and EU law side by side.

While the position of the majority of states worldwide on electoral rights for non-nationals is still relatively restrictive, it is clear that the existence of entities such as the European Union which mandate the extension of certain national political participation rights to groups of *privileged* non-nationals (i.e. EU citizens), combined with the inclusive national policies followed in a number of states in the EU, as well as elsewhere in Europe and the world,<sup>11</sup> have blurred, at least partially, the allegedly sharp boundaries between citizens and non-citizens. This seems to suggest that empirically speaking the distribution of the rights of citizenship may be a little messier than the democratic ideal might at first blush demand. But this mismatch of theory and practice does not necessarily act as a direct challenge to *normative* arguments that citizenship *should* continue to be seen as a democratic ideal, although it does raise many questions about what the reference point

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<sup>8</sup> Ibid.

<sup>9</sup> Voting in local elections by third country nationals is possible in principle in Spain under conditions of reciprocity, but in reality it is restricted to citizens of Norway. This excludes Spain's large population of Moroccan and Latin American immigrants (although some of the latter have either Spanish citizenship by descent or, more often, Italian citizenship by descent).

<sup>10</sup> Shaw, above n 1, especially ch 7.

<sup>11</sup> Norway, some Swiss cantons and municipalities, Venezuela and South Korea are examples of the diverse range of states which offer votes in local elections; Uruguay and New Zealand are two of the rather fewer examples of states which allow non-nationals to vote in national elections.

for the notion of democracy should be in the future. Should it be defined as operating within each individual state or by reference to a wider cosmopolitan political community which would demand rights across state borders? Applying this to the case of the UK, we should ask whether either the EU understood as a polity with its restricted range given to nationals of the Member States, or the relationships which exist horizontally between the UK and its fellow Member States, have a role to play so far as pertains to the task of identifying the appropriate reference point for assessing the proper scope of democratic participation.

Indeed, the difficulties inherent in matching the democratic ideal against the messy political reality are well illustrated by the case of citizenship and voting rights in the United Kingdom. The UK has a complex and variegated system of political participation rights, which need to be studied in the context of the wider structures of European integration as well as the UK's own history and contemporary politics. Studying UK political participation rights means exploring the nature of citizenship in a multi-level and highly internally differentiated polity. It offers, therefore, a case study which illuminates very clearly how the condition of citizenship can best be understood wherever there are multiple and often competing sites of legal, constitutional and political authority. For the UK, like the European Union itself, is a multi-level polity, where the exercise of power is increasingly contested. Like the EU it also has a framework of electoral entitlements which is both geographically differentiated and partially inclusionary, in the sense that certain groups of people are treated as privileged non-nationals (that is, Commonwealth citizens as well as EU citizens). The entry point for the discussion is offered by debates about citizenship in the UK, which have become more prominent since the mid-2000s than they have been for several decades, and from this initial presentation, the argument is built outwards towards a more general reflection upon the nature of inclusion and exclusion in a wider European context. Through an

assessment of these debates we can start to see some of the challenges of constructing a coherent membership principle for those citizenship rights such as the right to vote which exist in a state such as the UK, which is a member of both the European Union and the Commonwealth, as well as a composite 'union state' marked by close historic ties with another state with which it shares these islands off the north west coast of continental Europe, the Republic of Ireland.

## **1. Citizenship debates in the United Kingdom**

Debates about citizenship in the UK have been given a prominent role within a wider national debate about the notion of 'Britishness' which was promoted by Gordon Brown when he became Prime Minister in the middle of 2007. As part of this Britishness debate, Brown commissioned the former Attorney General Lord Peter Goldsmith to deliver a report which would provide a fuller picture of the current state of citizenship in the United Kingdom, whilst at the same time providing some suggested recommendations on how the allocation of citizenship rights could be used in order to foster a stronger and more cohesive sense of (national) citizenship. Goldsmith's report delivered in March 2008<sup>12</sup> suggests that there is a need to 'make proposals for how to introduce greater clarity to the 'citizenship settlement' between citizens and the state.' The Report intimates that this lack of clarity is a historical relic which can be corrected for the future.

Both the debate more generally and the specific recommendations made by Goldsmith have to be viewed against the background of the contemporary challenges posed to notions of British citizenship by a number of factors. These include very high levels of inward (and outward)

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<sup>12</sup> Lord Goldsmith QC, *Citizenship: Our Common Bond*, Citizenship Review, March 2008; available from <http://www.justice.gov.uk/reviews/citizenship.htm> (hereinafter 'Goldsmith') p12.

migration since the 1990s (some temporary; some permanent); the shock that some British citizens could take up political violence against civilians in general and especially against their fellow citizens, in the name of and in support of radical Islamic sentiments; and the continuing uncertainties about the long term political and territorial settlement within the UK in the wake of the election of a Scottish National Party government in Scotland in 2007, not to mention the complexities of Northern Irish politics since the peace settlement and the introduction of power-sharing between the nationalist and unionist communities. As regards the immigration-related dimensions of these challenges, Goldsmith's has not been the only recent contribution to the debate: in February 2008, the Home Office produced a report called *The Path to Citizenship: Next Steps in Reforming the Immigration System*, which explicitly linked the process of accessing national citizenship to the proposition that a person must display certain features and must 'deserve' to access British citizenship. In other words, it is not just about long term residence, the acquisition of English language skills, the absence of criminal convictions or other signals of delinquency, and the passing of a citizenship test, but also potentially about the pursuit of 'active' citizenship through contributions which are not required of those who acquire citizenship by descent or birth. This paper, along with the subsequent publication of a Borders, Citizenship and Immigration Bill under debate in the Westminster Parliament since January 2009, highlights that Goldsmith's more informal review of the state of British citizenship is rooted both within a more general debate in government circles about integration and citizenship as well as proposed legislative changes to the rules governing the acquisition of UK citizenship by migrants in particular.

It is interesting to note that Goldsmith's Report is entitled *Citizenship: Our Common Bond*. It is this bond which is the focus of the key recommendations, many of which have proved to be

controversial; none, so far, have been implemented. For example, the report suggested that there should be citizenship ceremonies for all young people, rather than just for 'newcomers' going through the naturalisation process, as has been the case since 2004 by virtue of provisions contained in the Nationality, Immigration and Asylum Act 2002.<sup>13</sup> The idea of ceremonies for all, likely to coincide with a young person reaching the minimum school leaving age, is intended to promote a stronger sense of common belonging, and to mark a rite of passage. The suggestion received a good deal of mixed comment; outside England, most of the comment was rather negative because of the difficulties of reconciling the conscious affirmation of a single common national citizenship (with the apparently inevitable connotation of pledging allegiance to the Crown) with the complex (sub)-national identities which are especially common amongst those resident in Northern Ireland, Scotland and Wales.<sup>14</sup>

Less attention was paid by commentators to those sections of the report which addressed the current *mélange* of electoral rights for citizens and non-citizens which exists in the UK. This *mélange* is as much the result of the UK's earlier imperial history and its ongoing relationships with Commonwealth states and with the Republic of Ireland, as it is the result of the impact of EU law in the Treaty of Maastricht in 1993. Thus not only EU citizens but also Commonwealth and Irish citizens are privileged non-nationals in a UK electoral context. Irish, Maltese and Cypriot citizens fall into two categories of privilege, and – unlike other EU citizens – they can vote and stand for election in all elections in the UK, including elections to the UK parliament in Westminster. The Representation of the People Act 1918 established the first truly democratic franchise for the Westminster parliament, abolishing property qualifications for men and introducing the franchise

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<sup>13</sup> See M Rimmer, 'The Future of Citizenship Ceremonies', paper prepared as part of the Goldsmith Citizenship Review, October 2007, available from <http://www.justice.gov.uk/reviews/citizenship.htm>.

<sup>14</sup> See for example, 'Salmond slates 'Pythonesque' UK citizenship plan', *The Herald*, 12 March 2008.

for (some) women for the first time. The franchise was, at the time, given to 'British subjects', there being then no modern conception of British citizenship. When Ireland and what are now the countries of the Commonwealth became independent states at various points during the twentieth century, the franchise arrangements were preserved and updated.<sup>15</sup> The relevant consolidating legislation laying down the general entitlement to vote is the Representation of the People Act 1983, as amended.<sup>16</sup> In this political sense, neither Irish nor Commonwealth citizens are treated as 'aliens', although in the case of the latter group the right to vote and to stand<sup>17</sup> in any elections in the UK is subject to immigration status. Only persons who are 'qualifying', in the sense of not requiring leave to enter or remain, or having been granted it, are able to vote and to stand. For Maltese and Cypriot citizens, who are both Commonwealth citizens and EU citizens, this qualification does not apply, as indeed it does not for Irish citizens. EU citizenship – and the free movement rights associated with it – takes precedence over Commonwealth citizenship, in that sense.

It is worth mentioning that some degree of reciprocity exists between the voting rights of Irish citizens in the UK and those of UK citizens in Ireland. In 1985, after a Supreme Court case<sup>18</sup> which required this matter to be put before a referendum in order to effect a constitutional change, legislation was introduced to allow UK citizens to vote (but not stand) in *Dáil* (ie, lower house) elections, although not to stand.<sup>19</sup> This was done in the name of reciprocity by the Irish

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<sup>15</sup> See for example the Ireland Act 1949.

<sup>16</sup> For more details on all UK elections see House of Commons Library Standard Note, 'Electoral Franchise: Who Can Vote?', SN/PC/2005, 1 March 2005.

<sup>17</sup> The right to stand for election is covered by the Act of Settlement 1700, although the issue of immigration status is dealt with by the Electoral Administration Act 2006, s18. See House of Commons Library Standard, 'The Franchise and Immigration Status', SN/PC/419, 11 October 2005, House of Commons Library Research Paper 05/65, 'The Electoral Administration Bill 2005', October 2005.

<sup>18</sup> *In the Matter of Article 26 of the Constitution and in the Matter of the Electoral (Amendment) Bill, 1983* [SC No. 373 of 1983] [1984] IR 268

<sup>19</sup> Electoral (Amendment) Act 1985.

Parliament. Bearing in mind that there are no elections to the upper house of Parliament in the UK, nor for the Head of State, it is understandable that voting rights were not given in elections for the *Seanad Éireann* and the President of Ireland to UK citizens. There is also a lack of parallelism in relation to referendums. Irish citizens may be able to vote in referendums in the UK, depending upon the legislation establishing both the question and the franchise,<sup>20</sup> but given the specific constitutional status and function of referendums in Ireland, where popular consent for constitutional change is formally built into the system, it is not surprising that UK citizens again are not permitted to vote. Goldsmith mentions these rights very briefly,<sup>21</sup> but does not discuss the broader issues in the context of either European integration or the historical evolution of UK-Irish relations which lies behind these developments.

The other novelty of UK political participation rights is that they display some degree of internal variation and geographical differentiation. This stems partly from the fact that certain types of elections (notably those for the devolved bodies of Scotland, Northern Ireland and Wales, as well as the Mayor and Assembly of London) simply do not exist in some parts of the UK, so that voters in the UK have different political rights depending upon where they are resident. But the real curiosity stems from the decision to give EU citizens the right to vote and to stand in these categories of elections.<sup>22</sup> It is entirely a matter of internal choice for the UK to extend the local electoral rights mandated by the EC Treaty to the 'regional' level, where such elections exist in the

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<sup>20</sup> E.g. the Government's European Union Bill introduced into the House of Commons 2005 and providing for a referendum on the Constitutional Treaty was based on, but went somewhat beyond, the Westminster franchise, as the basis for giving a right to vote (cl 7).

<sup>21</sup> Goldsmith, at 49.

<sup>22</sup> S 3(1) of the Local Government Elections Regulations 1995 (SI 1995, no 1948) provides the basic amendments to the local electorate to incorporate the requirements of EU law; in relation to the inclusion of EU citizens in the 'regional' franchise see s17 of the Greater London Authority Act 1999; s11 of the Scotland Act 1998; s10 of Schedule 1 of the Government of Wales Act 1998; s2(2) of the Northern Ireland (Elections) Act 1998. For further discussion, see J Shaw, 'Political Rights and Multilevel Citizenship in Europe', in E Guild and S Carrera (eds), *Integration of Third Country Nationals and Illiberal Practices in the EU* (Ashgate, Houndsmills, forthcoming).



UK, and indeed the UK is the only EU Member State to do so. Votes in elections to the subnational units of federal or quasi-federal states such as Austria, Belgium, Germany and Spain are not included in the scheme of EU law rights in those states, which extend only to the lowest level of municipal democracy. While electoral rights for EU citizens to vote in 'county-level' elections are extended alongside municipal electoral rights voluntarily by a number of Member States which have such elections, such as Hungary and Sweden (and indeed the UK, where such entities exist), these levels of government represent more accurately an expression of local self-government than they do the exercise of legislative sovereignty. The UK devolution scheme is different, with a territorially differentiated scheme for internal governance which some would call quasi-federal in nature.<sup>23</sup> The Scottish Parliament, in particular, which has the power to pass primary legislation under the Scotland Act 1998, has very significant powers which cut directly into the legislative sovereignty of the UK as a whole. Moreover, since the passing of the Government of Wales Act 2006, considerably more power actually and potentially is also conferred upon the Welsh Assembly to pass measures which are definitely more substantial than 'simple' delegated legislation. Likewise in relation to Northern Ireland, ever more substantial areas of competence, along with the power to take relevant measures, are likely to be passed to the Assembly and to the Northern Irish ministers in the future.

It is worth noting that the UK has gone even further than giving the right to vote and to stand to EU citizens; with the exception of the devolution referendum in Northern Ireland which was conducted on the basis of the Westminster franchise, EU citizens were able to vote in all of the referendums which have preceded the establishment of the various devolved elected bodies throughout the UK, on the basis of residence in the relevant part of the UK. Ascertaining why the

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<sup>23</sup> See for example A. Gamble, 'The constitutional revolution in the United Kingdom', (2006) 36 *Publius: The Journal of Federalism* 19–35.

UK should proceed in this manner is a little tricky, especially since the previous round of devolution referendums held in early 1979, when the proposals for both Scottish and Welsh assemblies were rejected (in the former case because, although there was a majority, it was not a sufficiently large one), used the Westminster franchise as the basis for determining who should vote in the referendums. It seems most plausible to suggest that the decision to use the local government franchise and electoral register as the basis for determining who could vote and stand for election expressed an intuition that devolution marks the extension of what constitutes 'the local' within UK constitutional politics.<sup>24</sup> Devolution is not, on this reading, the revised expression of the notion of constituent power within a quasi-federal state. However, while the notion of 'the local' may have been the aspiration of those in Unionist parties who drove the devolution agenda from the early 1990s onwards, and who brought it to formal fruition after the election of the Labour Government in May 1997, a different constitutional reality has arguably emerged since then. In this context, devolution is more a process than a 'thing', demonstrating the capacity to result in changes in the UK's fundamental territorial settlement. This has become all the more striking, especially since the election of governments in Northern Ireland, Scotland and Wales, where nationalist parties which did not necessarily participate fully in the 'devolution' agenda now share or hold power.

Lord Goldsmith's arguments when discussing the right to vote and to stand for election in his Report were somewhat perfunctory. He focused on the external exclusivity of national citizenship, arguing that:

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<sup>24</sup> It also avoids the question of expatriate voting, which was introduced for the first time into UK law after the election of the Conservative Government in 1979, which followed the first round of failed devolution referendums.

Voting in all elections, along with holding a passport, is the ultimate badge of citizenship. That view is reflected in the rules of most other countries around the world which do not permit anyone but citizens to participate – or to stand – in national or often even local elections. Clearly in the UK we do not have the same clarity around the significance of citizenship.<sup>25</sup>

He went on to propose

that the government gives consideration to making a clear connection between citizenship and the right to vote *by limiting in principle the right to vote in Westminster elections to UK citizens*. This would recognise that the right to vote is one of the hallmarks of the political status of citizens; it is not a means of expressing *closeness between countries*. Ultimately, it is not right to give the right to vote to citizens of other countries living in the UK until they become UK citizens' (emphases added).<sup>26</sup>

It is not explicit in the discussion in the body of the report, but is made clear in the executive summary,<sup>27</sup> that Goldsmith would propose narrowing UK voting rights down just to what is *required by EU law*, and no more. Hence he does not touch European Parliament electoral rights at all, even though the precise nature of the right to vote in European Parliament elections and consequently the implications of such a right for elections and democratic participation at the national level remains somewhat uncertain. All Commonwealth voting rights (apart from Maltese and Cypriot citizens' EU rights) and Irish voting rights (apart from EU rights) would go, since in Goldsmith's argument the historical or contemporary closeness between the relevant countries is not sufficient to outweigh the need to link the gold standard of political participation with the

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<sup>25</sup> Goldsmith, at 75.

<sup>26</sup> Goldsmith, at 75-76.

<sup>27</sup> Goldsmith, at 6.

formal membership of the polity. This includes removing voting rights in devolved and local elections from almost all Commonwealth citizens. It is therefore anomalous that Goldsmith does not question the voting rights for EU citizens (including Irish, Maltese and Cypriot citizens) in the devolved elections. Given the increasingly powerful nature of those bodies, a consistent approach to citizenship in accordance with the principles articulated by Goldsmith would surely demand the inclusion of these elections in list of those confined to UK citizens. Moreover, it is clear that these rights are *not required* by EU law. Yet the accommodation of the strict requirements of EU law does seem to have been the test which Goldsmith applied, when allowing departures from the national principle which he preferred for all types of UK elections. Accordingly, it would seem that failing to address this question is inconsistent in the light of his predominant theme.

It is also interesting that Goldsmith himself recognises that apart from EU law there are at least two other important constraints upon the extent to which UK voting rights can be 'tidied up' along the statist lines suggested in the report. First, he accepts that those Commonwealth and Irish citizens who have already acquired rights to vote in Westminster elections should not lose them so long as they remain resident in the UK. His proposals are merely aimed at newcomers. Second, there is the 'problem' of the Good Friday Agreement, signed in April 1998 by the UK and Irish Governments and explicitly endorsed by most of the Northern Irish political parties.<sup>28</sup> In addition to settling the details of the power sharing arrangements for devolved government in Northern Ireland, this document recognises and guarantees that the people of Northern Ireland are free to take either British or Irish citizenship (or both), and to identify themselves as British or Irish as they wish. Goldsmith thus recognised that his neat scheme based on UK citizens voting in UK elections must cede in the face of the complexities of the peace process in Northern Ireland. Ever hopeful,

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<sup>28</sup> For the text of the Agreement see <http://www.nio.gov.uk/agreement.pdf>.

he suggested that distinguishing between Irish citizens in the UK who are not connected to Northern Ireland and those who are was merely a practical problem which could be overcome, so that only the former would be denied the right to vote in Westminster elections. Beyond this concession, it is interesting that Goldsmith does not seem to think that the case of Northern Ireland poses more than practical difficulties. The irony of this conclusion, quite apart from potentially trivialising the serious practical obstacles to drawing the distinctions suggested, given the possibilities for mobility between Ireland, Northern Ireland and Great Britain, is that as an outcome it would suggest that any rearrangement of UK citizenship rights must necessarily continue to respond to complex political and historical reality, rather than simply reflecting some single model of (exclusive) membership based on the tightness of the connection between citizen and state. This is precisely the opposite principle to that which Goldsmith intends to defend. Not seeing that irony, Goldsmith consequently fails to engage with the argument that such an 'anomaly' in practice undermines the very cleavage he wishes to highlight between the vertical state-citizen relationship on the one hand, and the horizontal relationships between states, on the other.

Indeed, the biggest challenge to Goldsmith's scheme for citizenship rights does not concern his attempt to distinguish between democratic principle and messy political practice, but instead attacks the very nature of the principle which he seeks to defend. For Goldsmith rejects the proposition that the notion of citizenship which operates in the context of a member state of the European Union could, or should, have a horizontal dimension other than in relation to the obligations explicitly required by the EC Treaty. On the contrary, in Goldsmith's worldview, it is the vertical relationship which matters and, despite plenty of discussion of the rights (and very limited duties) flowing from EU law in the report, it is also clear that in the context of voting rights he

privileges the (national) state above all other sites of political and legal authority. This is the ultimate legitimate reference point for determining questions of political community, regardless of the existence of the EU.

Now at one level it is quite easy to dismiss the UK's messy and piecemeal franchise arrangements as lacking a single organising and consistent principle of membership, making it practically impossible to reform one part of them without this impacting upon another part. But a different way of looking at the problem is to reconceptualise the task as the search to elaborate a more consistent principle of membership in a complex multi-levelled polity (the UK) nested in another complex multi-levelled polity (the EU). Such a principle should ideally both explain existing patterns of rights, and also provide predictions as to future developments. Goldsmith has proffered what he suggests is a fundamentally 'national' perspective upon reforming UK voting rights. This is certainly a principle which has been defended quite staunchly by some theorists and commentators.<sup>29</sup> But another perspective could focus instead on what may be seen as the inextricable links between the vertical and the horizontal bonds which make up the complex figure of citizenship in the multi-level Euro-polity. It is not, on this view, about forcing a choice between fostering close polity/citizen links and sustaining the 'closeness between countries' which Goldsmith mentions rather dismissively. Both these principles may operate side by side in a transformed political space. This approach, it could be argued, offers a better basis for building a dynamic model of membership, one which could even – for example – survive a fundamental change in the basis of the UK polity, such as the ending of the historical union between England and Scotland, and all that follows from this. Above all, it would go beyond merely assigning a

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<sup>29</sup> See in particular D Goodhart, *Progressive Nationalism. Citizenship and the Left* (London, DEMOS, 2006) who defends a more tightly bound national concept as the best way of defending ideals about collective welfare and security which are generally associated with the left of the political spectrum. For a more academically constructed defence, see also D Miller, *On Nationality* (Oxford, Oxford University Press, 2005).

negative (constraining) meaning to developments within EU law, so far as they impact upon electoral sovereignty in the UK. In other words, EU law should not just be seen as something which constrains the expression of sovereignty in the UK, but as having its own constitutive force, which is often expressed in combination with national constitutional law rather than in isolation from national constitutional law.<sup>30</sup> To this end, we need to figure out in more detail the contemporary meaning of citizenship in the European political space and to identify relevant transformatory processes, by focusing on the dynamic interactions between different elements of membership within a multi-level and highly differentiated Euro-polity. One perspective upon this question can be gained by focusing on some recent case law of the Court of Justice on political rights.

## **2. What is ‘citizenship’ in the context of the Euro-polity?**

Since 1993 and the inception of the Treaty of Maastricht, commentators have reflected in detail upon the nature of citizenship of the Union.<sup>31</sup> Many have concluded – to use the terminology applied by Paul Marnette, in turn borrowed from ancient Greece – that the horizontal ‘isopolity’ element, comprising the principles of non-discrimination and free movement which protect the transnational migrating EU citizen, is much more developed than the vertical ‘sympolity’ element, based on the constitution of a (political) relationship between the citizen and the Union.<sup>32</sup> Yet, the latter – if developed – would also have the potential to affect the status of all EU citizens, including the non-migrating ones. To put it another way, the market citizen dominates the political one,

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<sup>30</sup> For a more extended articulation of this position, see the work of Leonard Besselink, in particular L Besselink, ‘The Notion and Nature of the European Constitution after the Reform Treaty’, (ms, January 18, 2008, <http://ssrn.com/abstract=1086189>) and L Besselink, *A composite European Constitution* (Groningen, Europa Law Publishing, 2007).

<sup>31</sup> For a review of the debates and of the relevant legal developments, see Shaw, above n 1, especially ch 2.

<sup>32</sup> P Marnette, *Citizenship: The History of an Idea* (London, ECPR, 2005) 177.

with the latter predominantly a thing of potential, rather than a current reality. This point was well expressed by Ulrich Preuss in an early commentary:<sup>33</sup>

European citizenship does not mean membership in a European nation, nor does it convey any kind of national identity of 'Europeanness'. Much less, of course, does it signify the legal status of nationality in a European state. Rather, by creating the opportunity for the citizens of the Member States of the European Union to engage in manifold economic, social, cultural, scholarly, and even political activities irrespective of the traditional territorial boundaries of the European nation-states, European citizenship helps to abolish the hierarchy between the different loyalties...and to allow the individuals a multiplicity of associative relations without binding them to a specific nationality. In this sense, European citizenship is more an amplified bundle of options within a physically broadened and functionally more differentiated space than a definitive legal status.

As this suggests, it may in fact be both artificial and misleading to reflect – whether in a negative or a positive light – upon Union citizenship as a discrete concept, which can be studied in isolation, without taking into account the reconstructive potential of the complex multilevel nature of the Euro-polity itself, with its multiple sites of legal, political and constitutional authority. In this polity, impacts and effects occur across both the (vertical) levels between the EU, the Member States and the substate regions and nations, as well as horizontally between states and regions, as the regulatory practices adopted and the choices made in one state increasingly impact upon the others. Translating this into the citizenship domain, Samantha Besson and André Utzinger<sup>34</sup>

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<sup>33</sup> U Preuss, 'Problems of a Concept of European Citizenship', (1995) 1 *European Law Journal* 267-281 at p280.

<sup>34</sup> S Besson and A Utzinger, 'Toward European Citizenship', (2008) 39 *Journal of Social Philosophy* 185-208; see also L Besselink, Case Notes on *Gibraltar, Aruba, and Sevinger and Eman v The Netherlands*, (2008) 45 *Common Market Law Review* 787-813, at p801, arguing that the composite constitutional arrangement underpinning the Euro-polity is not a 'monolithic European concept of citizenship'.



suggest the use of a composite figure of 'European citizenship', as the means of reflecting how citizenship is now firmly rooted in *both* the EU *and* the national levels (and, one might add, the subnational level). While Union citizenship is parasitic upon the definition of national citizenship,<sup>35</sup> so that only nationals of the Member States may be citizens of the Union, and the Union is not capable of determining autonomously the outer normative limits of its own citizenship, it is equally true to say that the national level of citizenship is itself increasingly contingent in nature. It is affected first by transnational ties and links based on factor and commodity mobility and on political, socio-economic and even cultural integration between states and peoples and second, in both direct and indirect ways, by directly applicable EU Treaties and laws which cut into the fabric of national sovereignty. Besson and Utzinger express it thus:<sup>36</sup>

First, citizenship in Europe has become multileveled as European citizens are members of different polities both horizontally across Europe (other Member States) and vertically (European transnational, international, and supranational institutions). Second, national citizenship in and of itself has changed in quality and has been made more inclusive in its scope and mode of functioning. Union citizenship adds a European dimension to each national *demos* and, to a certain extent, alters national citizenship in reconceiving it in a complementary relation to other Member States' citizenships.

They see this as a transformation of *national* citizenship, with the reconfigured notion being best expressed through a concept of 'European' citizenship; this concept escapes the narrower classification of 'Union citizenship', which refers to the EU alone and excludes the national but increasingly europeanised dimension. It is an explicitly plural concept. Politically speaking, this

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<sup>35</sup> Art 17 EC: 'Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship.'

<sup>36</sup> Besson and Utzinger, above n 34 at 196.

expresses how the various national *demos* come together across national boundaries and in national and supranational fora to constitute a functional (but not ideational) European *demos* (a *demosi-cracy*, not a *democracy*<sup>37</sup>). But this contributes not only to the transformation of *national* citizenship, but also to the transformation of *Union* citizenship. Each level and each site of membership rights in a multilevel and territorially and politically differentiated polity contributes to polity-building, and is transformed through the iterative relations with other levels and concepts of membership.<sup>38</sup> Because of the market-dominated nature of Union citizenship in the early years, this process of transformation has been slower to take root in relation to the EU itself. But while the dramatic developments in the Court of Justice in relation to the concept of Union citizenship, since the Court first tested out of the concept in the *Martínez Sala* case in 1998,<sup>39</sup> have focused above all on the transborder rights of mobile Union citizens, there are now some limited signs that Union citizenship itself is being transformed into a more distinctively political entity, where the cross-border element is no longer the key to triggering the relevance of Article 17 EC on EU citizenship or to bringing about linkage between Article 17 and other fundamental principles of EU law such as equality.<sup>40</sup>

Of particular significance in this context is the *Aruba* case concerning the right to vote in European Parliament elections of Netherlands nationals resident in Aruba.<sup>41</sup> This territory is a semi-

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<sup>37</sup> See S Besson, 'Deliberative *demosi-cracy* in the European Union: Towards the Deterritorialization of Democracy', in S Besson and JL Marti (eds), *Deliberative Democracy and its Discontents: National and Post-National Challenges* (Aldershot, Ashgate, 2006) 181-214; K Nicolaïdes, 'We, the Peoples of Europe ...', (2004) 83 *Foreign Affairs* 97-110.

<sup>38</sup> See generally S Benhabib, *The Rights of Others* (Cambridge, Cambridge University Press, 2004).

<sup>39</sup> Case C-85/96 *Martínez Sala v Freistadt Berlin* [1998] ECR-I 2691.

<sup>40</sup> It is certainly clear in the Court of Justice's case law on the effects of EU citizenship rights on national laws on the acquisition and registration of surnames that the link does not have to be economic in any way, and indeed does not have to pertain to accessing a benefit which is otherwise within the material scope of EU law: see Case C-148/02 *García Avello v. Belgian State* [2003] ECR I-11613 and Case C-353/08 *Grunkin and Paul v. Grunkin-Paul and Standesamt Stadt Niebüll*, judgment of 14 October 2008.

<sup>41</sup> Case C-300/04 *Eman and Sevinger v. College van burgemeester en wethouders van Den Haag (Aruba)* [2006] ECR I-8055.

autonomous part of the Kingdom of the Netherlands, and it is not part of the European Union. This small group of EU citizens resident on a Caribbean island were able to establish that they had been discriminated against as a result of a Dutch legislative scheme which did not give them the right to vote in European Parliament elections so long as they were resident in Aruba, but did give it to them if they moved to a third country, where they would be covered by the normal expatriate voting rules under Dutch law. These gave all Netherlands nationals the right to vote in European Parliament elections without distinguishing as between whether they had previously been resident in Aruba or in the European part of the Netherlands. Effectively, the Arubans established that the Dutch legislative scheme was irrational, and needed to be revised, even though ostensibly Article 1(2) of the European Parliament Elections Directive seems to preclude EU law interference into national discretion in relation to expatriate and or external voting by nationals.<sup>42</sup> Thus, Member States are not free to leave in place schemes which discriminate amongst different groups of EU citizens by treating different categories of nationals differently, even where they have not moved from one Member State to another.

What is interesting about the *Aruba* case is that the express provisions of the EC Treaty on electoral rights are, as noted above, limited to an equal treatment right under Article 19, giving EU citizens the right to vote and stand in European Parliament elections under the same conditions as nationals when resident in *another* Member State. There are no provisions of the EC or EU Treaty either in their present versions, or indeed in their putative post-Lisbon versions, which state – in terms – that EU citizens have the right to vote in European Parliament elections (that is, the right to vote for ‘their’ Parliament). Indeed, most aspects of European Parliament elections are still dealt with under national law including, for example, the question whether it is permissible for

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<sup>42</sup> See above n 6.

Member States to include third country nationals amongst the electorate for these elections within their territory.<sup>43</sup> What the *Aruba* case has done is to bring a degree of Court of Justice control over national legislative restrictions on the right to vote in European Parliament elections, preventing a Member State keeping in place an irrational legislative scheme, such as that described above, whereby EU citizens gain the right to vote by leaving a part of the national territory, albeit one which is not part of the EU.<sup>44</sup> It can now be argued that the Court implied, but did not make explicit, that the right to vote in European Parliament elections is a Union citizenship right. In contrast, Advocate General Tizzano in his April 2006 Opinion was much more explicit. Drawing on a range of material from the Treaty and from the European Convention on Human Rights and Fundamental Freedoms, which guarantees free and fair elections as well as universal suffrage, he concluded that it was indeed such a right, and moreover that it was *the most important* of the EU citizen's rights.<sup>45</sup>

*Aruba* has not been the only case in which the Court of Justice has looked at the conditions under which Member States regulate voting in European Parliament elections. In a case decided by the Court of Justice on the same day,<sup>46</sup> it was required to resolve a dispute between Spain and the UK about the precise terms under which the UK had responded to the requirements imposed upon it by the European Court of Human Rights case of *Matthews v United Kingdom*.<sup>47</sup> In a judgment of 18 February 1999, the Court found that the UK had violated Article 3 of Protocol No 1 of the ECHR, which obliges states to hold free and fair elections ensuring the free expression of the people in

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<sup>43</sup> See Case C-145/04 *Spain v. United Kingdom (Gibraltar)* [2006] ECR I-7917, discussed below.

<sup>44</sup> For a more extended discussion see J Shaw, 'The political representation of Europe's citizens: Developments', (2008) 4 *European Constitutional Law Review* 162-186

<sup>45</sup> Opinion of AG Tizzano of 6 April 2006, para 67: 'it can be directly inferred from Community principles and legislation as a whole, thus overriding any indications to the contrary within national legislation, that there is an obligation to grant the voting rights [in European elections] to citizens of the Member States and, consequently, to citizens of the Union.'

<sup>46</sup> Case C-145/04, above n.43.

<sup>47</sup> *Matthews v. United Kingdom* no 24833/94, ECHR 1999-I; [1999] EHHR 361.

the choice of the legislature, because it caused to be included in the original Act on Direct Elections to the European Parliament an annex limiting those elections to the UK territory alone, thus excluding Gibraltar. Gibraltarians objected to their exclusion, and successfully established before the Court of Human Rights that although Gibraltar is not part of the EU as such, it is affected by sufficiently large portions of EU law that it is possible to say that *vis-à-vis* this territory the European Parliament constitutes a legislature, and thus Gibraltarians have a right to a say in the composition of this body once it became directly elected. In extending UK electoral law to Gibraltar, which was incorporated into one of the UK's multi-member constituencies for the purposes of the 2004 European Parliament elections, the UK also granted the same rights to vote in European Parliament elections as apply in the UK. In other words, Commonwealth citizens resident in Gibraltar (some 100-200 persons) were allowed to vote in the elections organised in that territory.

Spain has used the prism of EU law as the basis for giving expression to its sovereignty claims *vis-à-vis* Gibraltar on a number of occasions, and it was therefore unsurprising that it chose to object to a number of the steps which the UK took to implement the *Matthews* judgment, including the extension to Commonwealth citizens of the right to vote. Of course, it is true that strictly speaking these arrangements do represent a violation of primary EU law in the form of the still unamended Annex to the Act on Direct Elections. However, the Act on Direct Elections was not amended because UK attempts in the wake of the *Matthews* judgment to remove the offending statement about only organising elections to the European Parliament in the UK were vetoed by Spain. Hence the UK had to choose the route of unilateral action.

After seeking in vain to persuade the Commission to bring an enforcement action against the UK under Article 226 EC, Spain itself brought an action against the UK in the Court of Justice under the rarely used Article 227 EC, seeking a declaration that it was acting in violation of its obligations under EU law, notably by allowing Commonwealth citizens to vote in European Parliament elections in Gibraltar. However, in its pleadings, Spain sought to distinguish the case of Commonwealth citizens voting in the rest of the UK, arguing that its points arose only in relation to Gibraltar; in practice, it is impossible to see how, if it were not permissible under EU law for the UK to extend the franchise to Commonwealth citizens in Gibraltar, it could be permissible in the UK. Consequently, in defending the action in the Court of Justice, the UK was not only defending the sovereignty issue in Gibraltar, but it was also defending what the Court of Justice itself called in its judgment one of the ‘constitutional traditions’ of the UK,<sup>48</sup> namely the pattern of Commonwealth citizen voting rights discussed in the previous section and under apparent threat in Goldsmith’s citizenship report. There is a manifest irony here. The language of ‘constitutional tradition’ will almost certainly have been fed to the Court of Justice by the defendants in the action – i.e. the UK. As the UK’s senior law officer (Attorney General) from 2001 to 2007, Lord Goldsmith must ultimately have sanctioned the defence of Commonwealth voting rights against attack by Spain as a ‘constitutional tradition’. By the time he issued *Our Common Bond*, it is clear that if he still thought that Commonwealth voting rights were a ‘constitutional tradition’ of the UK, then it must be a tradition which could be dispensed with, in the face of the need to see a purer reassertion of the national principle underpinning citizenship. To repeat the point made earlier, it is clear from the report taken as a whole that Goldsmith suggested reducing electoral rights in the UK down to the minimum mandated by EU law or necessitated by the difficulties discerned in relation to the Good Friday Agreement. If implemented, this would signal, presumably, a belated

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<sup>48</sup> Case C-145/04, paras 78 and 79 of the judgment.

victory for Spain, because in the *Gibraltar* case the Court of Justice found for the UK, concluding that there was nothing in the limited provisions of EU law applicable to European Parliament elections at the present time which required that the right to vote in European Parliament elections should be limited to EU citizens alone.

While the Court's judgment in *Gibraltar* might be thought to have little wider resonance beyond the specific, rather *sui generis* case, not least because unlike the *Aruba* case it is not framed in terms of the legal coordinates of EU citizenship, it is none the less interesting to see how easily and fluidly the Courts slips, in its reasoning, between the different constitutional orders. This is not – to reverse a criticism which Besselink makes of the Court of Human Rights in relation to a case on Netherlands national voting rights in Aruba which came before it in 2007<sup>49</sup> – an instance of 'compartmentalized reasoning',<sup>50</sup> in which the constitutional orders of the EU and the UK are seen as separate and unrelated to each other. Quite the contrary. The Court works constructively with the approach taken by a state such as the UK to categories such as Commonwealth citizens even though this clearly has spillover effects *vis-à-vis* the EU itself as well as the other Member States. For this approach effectively mandates an inclusive approach at the outer borders of the EU in relation to this particular EU citizenship right, the right to vote in European Parliamentary elections. Some states, such as Spain in this particular case, have clearly reacted negatively to the impact of these spillovers. But sometimes states react positively to spillovers or externalities resulting from the citizenship laws of the other states. This is the case with Ireland. It reacted, after some time, to the existence of voting rights for its citizens in the UK by instituting some reciprocal rights. Obviously, it is not directly a concern of Goldsmith – or indeed the UK if it chose

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<sup>49</sup> *Sevinger and Eman v The Netherlands*, Applications 17173/07 and 18180/07, judgment of 6 September 2007 declaring the applications manifestly inadmissible.

<sup>50</sup> Besselink, Case note, above n 34 at p802.

to enact the measures necessary to repeal Irish voting rights in Westminster elections – how Ireland would react to such a step. If one refutes *closeness between countries* as a relevant measure of constitutional action, then certain perspectives on what other states do necessarily flow from that. However, given the links which Ireland chose to make between its present reciprocal arrangements with the UK (albeit it partial in nature) and the wider question of its relations with other EU Member States, it is clear that answering the question about how Ireland might react does have a European (citizenship) dimension.

For it is interesting to note that when it changed its constitution and adopted the necessary primary legislation, Ireland set in place an enabling mechanism whereby – if conditions of reciprocity apply – the Minister can designate the citizens of *any* Member State as able to vote in *Dáil* elections. No further legislation is required. All that is required is that the other Member State should enfranchise Irish citizens. This might be, as I have argued elsewhere,<sup>51</sup> a trigger for *national* developments which effectively enrich the concept of EU citizenship, by relying precisely on ties of closeness, trust and reciprocity between states to extend voting rights in national elections to migrant EU citizens. But such initiatives would also enrich the composite notion of European citizenship sketched in this paper, not least because this would be an example of a set of national reforms effectively strengthening the supranational constitutional regime, and breaking down the barriers between the *demos* as they currently exist.

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<sup>51</sup> Shaw, above n 1 at pp202-206.



### 3. Conclusion

This paper has outlined an argument why a national principle alone is insufficient as the basis for modelling membership rights within a complex and composite polity such as the EU, at least where these take the form of voting rights. It has shown that EU law has developed substantially in relation to the constitutionalisation and concretisation of a set of political rights for EU citizens. These clearly impinge upon national sovereignty in relation to the allocation of the voting rights in local and European parliamentary elections. But more importantly the paper has identified the many iterative relations which are evolving between the various EU law rights under the Treaty, the specific interpretations which the UK (for example) chooses to place on these EU law rights by extending them to include the elections to the devolved bodies in the UK, and the UK's historical constitutional traditions so far as these extend to including certain privileged groups including third country nationals (Commonwealth citizens) within the franchise for national elections. At the very least, even without having regard to particularities such as the impact of the Good Friday Agreement, it is impossible not to conclude that any reform of UK voting rights would be a very complex process indeed. But more positively, one can draw an interim conclusion that it might not be impossible to discern the basis for a consistent model of membership. Such a conclusion derives its force from viewing the overall constitutional framework for the Euro-polity as a plural evolving framework in which there is constant spillover vertically from one level to another, and horizontally across the politically and territorially differentiated space. Further work is needed to identify more precisely what might be the precise contours of such a model, and in particular how it would model not only the relationships existing for the nationals of the Member States between their *national* citizenship and their *Union* citizenship, but also the outer contours of both national and EU citizenship, and the position of third country nationals. For in a polity where political

principles of participation eschew compartmentalisation on national lines, it is not necessarily obvious why, for example, the right to vote for the supranational European Parliament should not extend to *all residents* affected by its legislation. Such an argument, however, would require space beyond the scope of this paper for it to be developed in full; it must, at this stage, be left to one side.